

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1429

CAROL L. BRADLEY,
O. M. BRADLEY,
LAFAYETTE, INC.,

Petitioners,

v.

GLADYS B. WHITTEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
VIRGINIA

CAROL L. BRADLEY
O. M. BRADLEY
LAFAYETTE, INC.

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(ii)

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled case on January 7, 1977.

CITATIONS BELOW

The opinion of the Supreme Court of Virginia in denying petitioner's appeal is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on January 7, 1977. The

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jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

The Fourteenth Amendment to the Constitution is involved in this case.

QUESTIONS PRESENTED

Whether the defendants-petitioners were denied due process of law when the Supreme Court of Virginia refused to hear their appeal because it was untimely filed when the petitioners mailed their papers to the Court in the requisite amount of time and said papers were either lost or not received by the Clerk's Office.

STATEMENT

Respondent-plaintiff brought an action against the petitioners-defendants in the Circuit Court of the City of Richmond, Division I, Virginia, by a petition for a writ of attachment. Certain valuable antique furniture which was the subject of said attachment was

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put in the possession of plaintiff by the trial court upon plaintiff's posting of a \$40,000.00 bond.

When the matter came forward to be heard on the merits, after certain evidence was adduced, the parties entered into a consent decree providing that the petitioners-defendants could recover said furniture from plaintiff upon payment of certain monies on or before December 14, 1975.

On December 13, 1975, the court on oral motion of the petitioners-defendants granted the petitioners-defendants a fourteen-day extension from December 14, 1975 to pay said monies. On December 30, 1975, the court on oral motion of the petitioners-defendants granted the petitioners-defendants a fourteen-day extension from December 14, 1975 to pay said monies. On December 30, 1975, petitioners-defendants moved the trial court for a further

extension of time to pay said monies based on the fact that respondent-plaintiff's counsel had improperly interfered with defendants' efforts to obtain said monies by improperly and unlawfully refusing to release various judgments and liens on their real estate even though said judgments and liens had been satisfied, thereby preventing defendants from selling certain valuable real property, and on December 31, 1975 defendants moved for stay of execution for the same reasons.

The trial court refused to grant a further extension and entered a final order on December 31, 1975, refusing said extension and further granting counsel for plaintiff attorneys' fees in the amount of \$500.00.

Petitioners-defendants, by counsel, timely prepared and transmitted to the Clerk a notice of appeal and assignments of error. Such pleading was not filed by the Clerk and is not

in the court file. Respondent's-plaintiff's counsel has acknowledged receipt of a copy thereof.

The written statement of facts prepared by counsel for petitioners-defendants was timely filed on February 29, 1976, followed by a typewritten form filed on March 3, 1976, together with a notice of hearing scheduling presentation of the written statement of testimony for March 18, 1976. Respondent-plaintiff's counsel, by transmittal letter of March 4, 1976, transmitted to the court plaintiff's written statement with a certificate of service dated March 5, 1976, advised that he could not be at the March 18 hearing, requested that the court take the matter under advisement and allow him to be heard on his return to the country. The defendant's counsel was then permitted to withdraw, by order of the court, and no written statement of testimony was signed by the trial court.

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Assignments of error were prepared by defendants'-respondent's counsel, transmitted to the clerk, but are not in the court file. Evidence of the filing can be obtained by the affidavit of the petitioners-defendants' counsel and by the confirmation by the clerk of the court that a copy was served upon and received by plaintiff's-respondent's counsel. In the absence of the court clerk's filing the notice of appeal and assignments of error, the final order of the court below should be reversed and this case remanded with instructions to grant a new trial.

Although petitioner appealed to the Supreme Court of Virginia, the Supreme Court held that the appeal was not perfected in the manner required by law and therefore refused the petition of writ of error. Petitioner appeals from that order which is dated January 7, 1977.

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REASONS FOR GRANTING WRIT

Your petitioners have been denied due process of law in accordance with the Fourteenth Amendment to the United States Constitution as a result of the failure of the Supreme Court of Virginia to consider their appeal on its merits. Title 8 of the Code of Virginia contains the Rules of the Supreme Court of Virginia. Rule 5:1 §4 required a party to file a notice of appeal or assignment of error within 60 days of entry of a final judgment by a lower court. Petitioners' counsel mailed the notice of appeal and assignments of error within 60 days of entry of a final judgment by a lower court.

Petitioners' counsel mailed the notice of appeal and assignments of error in the requisite amount of time. Copies of the notice were received by opposing counsel but there is no indication in the clerk's records that the original was ever docketed in the clerk's office. In the case of Leigh v. Commonwealth,

192 Va. 583, 66 S.E.2d 586, where the deputy clerk failed to mark the correct filing date on the notice of appeal and affidavits of counsel established it was timely filed, the Supreme Court of Virginia refused to dismiss the appeal. The petitioners filed affidavits of counsel in the instant case showing the Notice of Appeal had been timely filed. Therefore, the writ of error should not have been denied.

CONCLUSION

For the above stated reasons, your petitioners pray that they be granted a writ of certiorari to the order entered January 7, 1977 of the Supreme Court of Virginia.

Respectfully submitted,

Carol L. Bradley
CAROL L. BRADLEY

O. M. Bradley
O. M. BRADLEY

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LaFAYETTE, INCORPORATED

By: O M. Bradley

CERTIFICATE

I hereby certify that a true copy of the foregoing Petition For Writ of Certiorari was mailed to V. Cassell Adamson, Jr., 100 East Main Street, Richmond, Virginia, 23219, prior to the filing of this writ with the Clerk of this Court on the 14 day of April, 1977.

Carol L Bradley
CAROL L. BRADLEY

O M. Bradley
O. M. BRADLEY

LaFAYETTE, INCORPORATED

By: O M. Bradley

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Appendix

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of January, 1977.

The petition of Carol L. Bradley, O. M. Bradley and LaFayetta, Incorporated, for a writ of error to a judgment rendered by the Circuit Court of the City of Richmond, Division I, on the 31st day of December, 1975, in a certain motion for judgment then therein depending, wherein Gladys B. Whitten was plaintiff and the petitioners were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, doth reject said petition and refuse said writ of error.

Record No. 760549

A Copy,

Teste:

AT. Turner

Clerk